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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
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11 JEFFERSON A. MCGEE,
12 Plaintiff,

No. CIV.S-04-2598 LKK DAD PS

13 v.

ORDER

14 ARNOLD SCHWARZENEGGER,
15 et al.,
16 Defendants.

17 _____/
18 This matter is before the court on plaintiff's motion for
19 summary judgment, which was submitted upon the record and briefs on
20 file pursuant to Local Rule 78-230(h). For the reasons explained
below, plaintiff's motion will be denied.

21 By order filed April 15, 2005, plaintiff's amended
22 complaint was dismissed with twenty days leave to amend. Plaintiff
23 did not timely file a second amended complaint. Rather, on April 29,
24 2005, plaintiff filed a motion for summary judgment, noticing the
25 motion for hearing on May 27, 2005. On the same day plaintiff also
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1 filed a motion for temporary restraining order and a motion for entry
2 of default judgment. Those motions were not set for hearing.

3 Each of the defendants have filed opposition to plaintiff's
4 motions asserting that plaintiff's motions are misplaced. Defendants
5 argue that presently there is no operative pleading on file in this
6 case, plaintiff's amended complaint having been dismissed and
7 plaintiff having failed to file a second amended complaint. In his
8 reply, plaintiff requests an extension of time to file his second
9 amended complaint.

10 Having considered all written materials submitted in
11 connection with motions, the undersigned agrees with defendants that
12 plaintiff's various motions are misplaced at this time. There being
13 no second amended complaint on file, even if the court were inclined
14 to recommend that summary judgment or default judgment be granted,
15 there simply is no pleading upon which judgment could be entered.
16 With respect to the motion for default judgment, the court also notes
17 that the Clerk of the Court has not entered the default of any
18 defendant, which is a prerequisite to seeking default judgment. See
19 Fed. R. Civ. P. 55(a).

20 Regarding the renewed motion for temporary restraining
21 order, since plaintiff has yet to file a second amended complaint the
22 undersigned presently is unable to assess whether plaintiff has shown
23 either a likelihood of success on the merits and the possibility of
24 irreparable injury, or that serious questions are raised and the
25 balance of hardships tips sharply in plaintiff's favor. See
26 Coalition for Economic Equity v. Wilson, 122 F.3d 692, 700 (9th Cir.

1 1997); Oakland Tribune, Inc. v. Chronicle Publ'g Co., 762 F.2d 1374,
2 1376 (9th Cir. 1985). Indeed, whether this court even has
3 jurisdiction over the motion for temporary restraining order depends
4 on the nature of the claim(s) in plaintiff's second amended
5 complaint. If the motion for injunctive relief raises issues
6 different from those presented in the complaint, the court likely
7 would have no jurisdiction over the motion. See Devose v.
8 Herrington, 42 F.3d 470, 471 (8th Cir. 1994); Stewart v. U.S.
9 Immigration and Naturalization Serv., 762 F.2d 193, 198-99 (2d Cir.
10 1985).

11 Finally, with respect to plaintiff's request for extension
12 of time to file his second amended complaint, plaintiff asserts that
13 he did not become aware of the April 15, 2005 order dismissing his
14 amended complaint until May 4, 2005, which is when he received
15 defendant City of Sacramento's opposition to plaintiff's motions.
16 Plaintiff represents that he never received a copy of the order by
17 mail and that he did not obtain a copy of the order until May 5,
18 2005, the same day plaintiff filed his request for extension of time.
19 The undersigned has no reason to doubt plaintiff's representations in
20 this regard, although the court notes that plaintiff has had ample
21 time to file a second amended complaint. Therefore, the undersigned
22 will reluctantly grant plaintiff's request for an extension of time.
23 However, plaintiff will be given ten additional days to file the
24 required pleading instead of the requested twenty days.

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Accordingly, IT IS HEREBY ORDERED that:

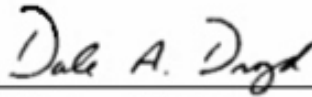
1. Plaintiff's motion for summary judgment is denied without prejudice as premature;

2. Plaintiff's motions for temporary restraining order and entry of default judgment also are denied without prejudice as premature; and

3. Plaintiff's request for extension of time is granted in part. Plaintiff shall file and serve any second amended complaint within ten (10) days of the date this order is filed. Failure to timely file a second amended complaint will result in a recommendation of dismissal.

IT IS SO ORDERED.

DATED: June 3, 2005.



DALE A. DRCZD
UNITED STATES MAGISTRATE JUDGE

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